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Copyright Royalty Board

37 CFR Part 381

[Docket No. 16-CRB-0002-PBR (2018-2022)]

Determination of Rates and Terms for Public Broadcasting (PB III)

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish this final rule regarding rates and terms for use of certain works in connection with noncommercial broadcasting for the period commencing January 1, 2018, and ending on December 31, 2022.

DATES: *Effective date:* This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability dates: This rule applies to the license period January 1, 2018, through December 31, 2022.

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 16-CRB-0002-PBR (2018-2022). For documents not yet uploaded to eCRB (because it is a new system), go to the agency website at <https://www.crb.gov/> or contact the CRB Program Specialist.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 118 of the Copyright Act, title 17 of the United States Code, establishes a statutory license for the use of certain copyrighted works in connection with noncommercial television and radio broadcasting. Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (“Judges”) to conduct proceedings every five years to determine the rates and terms for the section 118 license. 17 U.S.C. 801(b)(1), 804(b)(6). In accordance with section 804(b)(6), on January 5, 2016, the Judges commenced the proceeding to set rates and terms for the period 2018 through 2022. 77 FR 71104.

Copyright owners and public broadcasting entities¹ may negotiate rates and terms under the section 118 license for categories of copyrighted works and uses that would be binding on all owners and entities using the same license² and submit them to the Judges for approval. 17 U.S.C. 801(b)(7)(A). The participants³ in the proceeding settled and submitted to the Judges proposed rates for the relevant categories and uses, which the

¹ A “public broadcasting entity” is defined as a “noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in paragraph (2) of subsection (c)” of section 118. 17 U.S.C. 118(f).

² Copyright owners may negotiate rates and terms with specific public broadcasting entities for the use of all of the copyright owners’ works covered by the Section 118 license. Section 118(b)(2) provides that such license agreements “shall be given effect in lieu of any determination by the * * * Copyright Royalty Judges,” provided that copies of the agreement are submitted to the Judges “within 30 days of execution.” 17 U.S.C. 118(b)(2). The Judges received three such agreements (from BMI, ASCAP, and SESAC).

³ The Judges received settlement proposals from the following active participants: the American Society of Authors, Composers and Publishers (“ASCAP”); SESAC, Inc.; Broadcast Music, Inc. (“BMI”); Educational Media Foundation (“EMF”); National Public Radio (“NPR”) and the Public Broadcasting Service (“PBS”), jointly; National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”); the National Music Publishers’ Association (“NMPA”), The Harry Fox Agency (“HFA”), National Association of College and University Business Officers (“NACUBO”). The remaining active participant, Church Music Publishers Association (“CMPA”), approved the four joint proposals involving ASCAP/BMI/SESAC/HFA and NMPA and NRBNMLC/EMF.

Judges published in the *Federal Register* for comment on November 3, 2017. 82 FR 51589.

The Judges received two comments, a joint comment from participants ASCAP, BMI, NPR, PBS, and SESAC, and a comment from non-participant Global Music Rights, LLC (“GMR”)⁴.

The joint comment from participants proposed a revision to § 381.4(b) to conform it to §§ 381.5 and 381.6 by making explicit that the rates only apply to compositions not in the repertoires of ASCAP, BMI, and SESAC.⁵ This change would ensure that, were a voluntary agreement to terminate within the license period, the statutory rate would not apply to compositions in the repertoires of ASCAP, BMI, and SESAC. The Judges find the proposed revision is too late and they reject it for several reasons, including:

1. The proposed language was not sought by any party before the proposed regulations were published for public comment.
2. The proposed language is not in the current regulations.
3. The proposed regulation includes a rate for licenses that are not subject to a voluntary, negotiated agreement.
4. Extension, renewal, or renegotiation of any negotiated agreement to avoid the statutory rate is within the control of ASCAP, BMI, and SESAC.

⁴ The Judges correct one error in the proposed regulatory text published in the proposed rule. They remove the preface after the heading of 381.4 because that language (with proposed revisions) is now in subparagraph (a).

⁵ In the “Supplementary Information” provided in the Proposed Rule relating to this license, the Judges noted that “NPR and PBS filed proposed changes ... in § 381.4 ... [which] conform to analogous changes in §§ 381.5 and 381.6.” 82 FR at 51591 (Nov. 7, 2017). *See* Submission of NPR and PBS (Oct. 25, 2017). The conforming changes were those establishing the \$1.00 backstop rate. None of the participants sought the limitation language they now urge.

Notwithstanding the agreement of all parties who allegedly might be affected by this late-proposed change, making this change would alter the proposed regulation without affording interested parties an opportunity for review and comment or objection.

The comment from GMR raised two concerns. GMR objects to a decrease in the § 381.4 rate for non-participants and requests the Judges keep the current rates and add a one-time cost of living adjustment. It also objects to leaving the §§ 381.5 and 381.6 rates for non-participants at the current level and requests the Judges revise it to match the increase in the SESAC rate.

GMR did not file a Petition to Participate in the proceeding. It is allowed to comment, but the Judges need not accept its comments as an “objection” to be weighed. The Judges respectfully acknowledge GMR’s concerns, but those concerns cannot be a basis for the Judges to find that there is a reasonable objection to adoption of the rules. The Judges’ ability to reject an agreement on the reasonableness of the rates and terms proposed therein is constrained by statute. Specifically, section 801(b)(7)(A)(ii) directs the Judges to adopt proposed agreed rates and terms unless a participant to the proceeding objects.⁶ The entity objecting to the proposed rates and terms at issue, GMR, did not file a timely petition to participate in this proceeding, and it does not qualify as a participant to the proceeding⁷. Therefore, having received no objections to the reasonableness of the proposed rates and terms from a participant in this proceeding, the Copyright Royalty Judges adopt with one minor revision the final regulations as published on November 3,

⁶ The Register of Copyrights has opined that the statutory direction does not imply or require that the Judges must adopt proposed regulations that are inherently contrary to law. *See* 78 FR 47421.

⁷ In the Cable Sports Rule proceeding, docket number 15-CRB-0010-CA-S (Sports Rule Proceeding), the Judges gave the comments of non-participant Major League Soccer (“MLS”) more consideration by soliciting reply comments because the settlement in that proceeding excluded MLS from *any* royalty consideration. 82 FR 44368. In this proceeding, the settling parties proposed a rate for non-settling entities that would cover non-participant GMR.

2017, which set the rates and terms for the section 118 statutory license for the period 2018 through 2022.

List of Subjects in 37 CFR Part 381

Copyright, Music, Radio, Television, Rates.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend part 381 to chapter III of title 37 of the Code of Federal Regulations as set forth below:

PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

1. The authority citation for part 381 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

§ 381.1 [Amended]

2. In § 381.1, remove “2013” and in its place add “2018” and remove “2017” and in its place add “2022”.

3. Amend § 381.4 as follows:

- a. Remove the introductory text;
- b. Add introductory text to paragraph (a);
- c. In paragraph (c), remove “2013” and in its place add “2018” and remove “2017” and in its place add “2022”; and
- d. Remove paragraph (d).

The revision reads as follows:

§ 381.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).

(a) *Determination of royalty rate.* The following rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(c) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §§ 381.5 and 381.6, and except for compositions which are the subject of voluntary license agreements: the royalty shall be \$1.

* * * * *

4. Amend § 381.5 by revising paragraph (c) to read as follows:

§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

* * * * *

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, the royalty rates shall be as follows:

(i) *Music fees.*

	Number of Full-Time Students	2018	2019	2020	2021	2022
Level 1	< 1,000	\$352	\$359	\$366	\$373	\$380
Level 2	1,000 - 4,999	\$407	\$415	\$423	\$431	\$440
Level 3	5,000 - 9,999	\$557	\$568	\$579	\$591	\$603

Level 4	10,000 - 19,999	\$722	\$736	\$751	\$766	\$781
Level 5	20,000 +	\$908	\$926	\$945	\$964	\$983

(ii) Level 1 rates as set forth in paragraph (c)(1)(i) of this section, shall also apply to College Radio Stations with an authorized effective radiated power (ERP), as that term is defined in 47 CFR 73.310(a), of 100 Watts or less, as specified on its current FCC license, regardless of the size of the student population.

(2) For all such compositions in the repertory of BMI, the royalty rates shall be as follows:

(i) *Music fees.*

	Number of Full-Time Students	2018	2019	2020	2021	2022
Level 1	< 1,000	\$352	\$359	\$366	\$373	\$380
Level 2	1,000 - 4,999	\$407	\$415	\$423	\$431	\$440
Level 3	5,000 - 9,999	\$557	\$568	\$579	\$591	\$603
Level 4	10,000 - 19,999	\$722	\$736	\$751	\$766	\$781
Level 5	20,000 +	\$908	\$926	\$945	\$964	\$983

(ii) Level 1 rates, as set forth in paragraph (c)(2)(i) of this section, shall also apply to College Radio Stations with an authorized effective radiated power (ERP), as that term is defined in 47 CFR 73.310(a), of 100 Watts or less, as specified on its current FCC license, regardless of the size of the student population.

(3) For all such compositions in the repertory of SESAC, the royalty rates shall be as follows:

(i) 2018: The 2017 rate, subject to an annual cost of living adjustment in accordance with paragraph (c)(3)(vi) of this section.

(ii) 2019: The 2018 rate, subject to an annual cost of living adjustment in accordance with paragraph (c)(3)(vi) of this section.

(iii) 2020: The 2019 rate, subject to an annual cost of living adjustment in accordance with paragraph (c)(3)(vi) of this section.

(iv) 2021: The 2020 rate, subject to an annual cost of living adjustment in accordance with paragraph (c)(3)(vi) of this section.

(v) 2022: The 2021 rate, subject to an annual cost of living adjustment in accordance with paragraph (c)(3)(vi) of this section.

(vi) Such cost of living adjustment to be made in accordance with the greater of:

(A) The change, if any, in the Consumer Price Index (all consumers, all items) published by the U.S. Department of Labor, Bureau of Labor Statistics during the twelve (12) month period from the most recent Index, published before December 1 of the year immediately prior to the applicable year; or

(B) One and one-half percent (1.5%).

(4) For the performance of any other such compositions: \$1.

* * * * *

5. Amend § 381.6 as follows:

a. Remove from the first sentence of paragraph (a) the words “which are”;

and

b. Revise paragraph (d).

The revision reads as follows:

§ 381.6 Performance of musical compositions by other public broadcasting entities.

* * * * *

(d) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, the royalty rates shall be as follows:

(i) Music Fees (Stations with 20% or more programming containing Feature Music):

	Population Count	Calendar Years				
		2018	2019	2020	2021	2022
Level 1	0 – 249,999	\$697	\$711	\$725	\$739	\$754
Level 2	250,000 – 499,999	\$1,243	\$1,268	\$1,294	\$1,319	\$1,346
Level 3	500,000 – 999,999	\$1,864	\$1,901	\$1,939	\$1,978	\$2,017
Level 4	1,000,000 – 1,499,999	\$2,486	\$2,535	\$2,586	\$2,638	\$2,691
Level 5	1,500,000 – 1,999,999	\$3,107	\$3,169	\$3,232	\$3,297	\$3,363
Level 6	2,000,000 – 2,499,999	\$3,728	\$3,803	\$3,879	\$3,956	\$4,035
Level 7	2,500,000 – 2,999,999	\$4,349	\$4,436	\$4,525	\$4,615	\$4,708
Level 8	3,000,000 and above	\$6,214	\$6,338	\$6,465	\$6,594	\$6,726

(ii) Talk Format Station Fees (Stations with < 20% Feature Music programming):

	Population Count	Calendar Years				
		2018	2019	2020	2021	2022

Level 1	0 – 249,999	\$697	\$711	\$725	\$739	\$754
Level 2	250,000 – 499,999	\$697	\$711	\$725	\$739	\$754
Level 3	500,000 – 999,999	\$697	\$711	\$725	\$739	\$754
Level 4	1,000,000 – 1,499,999	\$870	\$887	\$905	\$923	\$942
Level 5	1,500,000 – 1,999,999	\$1,087	\$1,109	\$1,131	\$1,154	\$1,177
Level 6	2,000,000 – 2,499,999	\$1,305	\$1,331	\$1,357	\$1,384	\$1,412
Level 7	2,500,000 – 2,999,999	\$1,522	\$1,552	\$1,583	\$1,615	\$1,647
Level 8	3,000,000 and above	\$2,175	\$2,218	\$2,262	\$2,308	\$2,354

(2) For all such compositions in the repertory of BMI, the royalty rates shall be as follows:

(i) Music Fees (Stations with 20% or more programming containing Feature Music):

	Population Count	Calendar Years				
		2018	2019	2020	2021	2022
Level 1	0 – 249,999	\$697	\$711	\$725	\$739	\$754
Level 2	250,000 – 499,999	\$1,243	\$1,268	\$1,294	\$1,319	\$1,346
Level 3	500,000 – 999,999	\$1,864	\$1,901	\$1,939	\$1,978	\$2,017
Level 4	1,000,000 – 1,499,999	\$2,486	\$2,535	\$2,586	\$2,638	\$2,691
Level 5	1,500,000 – 1,999,999	\$3,107	\$3,169	\$3,232	\$3,297	\$3,363
Level 6	2,000,000 – 2,499,999	\$3,728	\$3,803	\$3,879	\$3,956	\$4,035
Level 7	2,500,000 – 2,999,999	\$4,349	\$4,436	\$4,525	\$4,615	\$4,708
Level 8	3,000,000 and above	\$6,214	\$6,338	\$6,465	\$6,594	\$6,726

(ii) Talk Format Station Fees (Stations with < 20% Feature Music programming):

	Population Count	Calendar Years				
		2018	2019	2020	2021	2022

Level 1	0 – 249,999	\$697	\$711	\$725	\$739	\$754
Level 2	250,000 – 499,999	\$697	\$711	\$725	\$739	\$754
Level 3	500,000 – 999,999	\$697	\$711	\$725	\$739	\$754
Level 4	1,000,000 – 1,499,999	\$870	\$887	\$905	\$923	\$942
Level 5	1,500,000 – 1,999,999	\$1,087	\$1,109	\$1,131	\$1,154	\$1,177
Level 6	2,000,000 – 2,499,999	\$1,305	\$1,331	\$1,357	\$1,384	\$1,412
Level 7	2,500,000 – 2,999,999	\$1,522	\$1,552	\$1,583	\$1,615	\$1,647
Level 8	3,000,000 and above	\$2,175	\$2,218	\$2,262	\$2,308	\$2,354

(3) For all such compositions in the repertory of SESAC, the royalty rates shall be as follows:

(i) Music fees for stations with $\geq 20\%$ Feature Music programming:

	Population Count	2018	2019	2020	2021	2022
Level 1	0 – 249,999	\$152	\$155	\$158	\$161	\$164
Level 2	250,000 – 499,999	\$253	\$258	\$263	\$268	\$274
Level 3	500,000 – 999,999	\$380	\$388	\$396	\$403	\$411
Level 4	1,000,000 – 1,499,999	\$507	\$517	\$527	\$538	\$548
Level 5	1,500,000 – 1,999,999	\$634	\$647	\$660	\$673	\$686
Level 6	2,000,000 – 2,499,999	\$760	\$775	\$790	\$806	\$822
Level 7	2,500,000 – 2,999,999	\$887	\$905	\$923	\$941	\$960
Level 8	3,000,000 and above	\$1,268	\$1,293	\$1,318	\$1,344	\$1,371

(ii) Talk fees for stations with $< 20\%$ Feature Music programming:

	Population Count	2018	2019	2020	2021	2022
Level 1	0 – 249,999	\$152	\$155	\$158	\$161	\$164
Level 2	250,000 – 499,999	\$152	\$155	\$158	\$161	\$164
Level 3	500,000 – 999,999	\$152	\$155	\$158	\$161	\$164
Level 4	1,000,000 – 1,499,999	\$177	\$181	\$185	\$188	\$192

Level 5	1,500,000 – 1,999,999	\$222	\$227	\$231	\$236	\$240
Level 6	2,000,000 – 2,499,999	\$266	\$271	\$277	\$282	\$288
Level 7	2,500,000 – 2,999,999	\$311	\$317	\$323	\$330	\$336
Level 8	3,000,000 and above	\$444	\$452	\$461	\$470	\$480

(4) For the performance of any other such compositions, in 2018 through 2022,

\$1.

* * * * *

6. Amend § 381.7 as follows:

- a. Revise paragraphs (b)(1)(i)(A) through (D) and (b)(1)(ii)(A) through (D);
- b. Revise paragraph (b)(2)(i) through (iv); and
- c. Revise paragraph (b)(4)(i) through (iii).

The revisions read as follows:

§ 381.7 Recording rights, rates and terms.

* * * * *

(b)* * *

(1)(i) * * *

2018-2022

(A) Feature \$118.70

(B) Concert feature (per minute) \$ 35.65

(C) Background \$ 59.99

(D) Theme:

(I) Single program or first series program \$ 59.99

(2) Other series program \$ 24.36

(ii) * * *

2018-2022

(A) Feature \$ 9.81

(B) Concert feature (per minute) \$ 2.58

(C) Background \$ 4.26

(D) Theme:

(1) Single program or first series of program \$ 4.26

(2) Other series program \$ 1.69

* * * * *

(2) * * *

2018-2022

(i) Feature \$ 12.85

(ii) Concert feature (per minute) \$ 18.86

(iii) Background \$ 6.44

(iv) Theme:

(A) Single program or first series program \$ 6.44

(B) Other series program \$ 2.57

* * * * *

(4) * * *

2018-2022

(i) Feature \$.81

(ii) Feature (concert) (per half hour) \$ 1.69

(iii) Background \$.41

* * * * *

7. Amend § 381.10 as follows:

a. In paragraph (a), remove “2013” everywhere it appears and in its place add “2018” and remove “2012” and in its place add “2017”; and

b. Revise paragraph (b).

The revision reads as follows:

§ 381.10 Cost of living adjustment.

* * * * *

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the Copyright Royalty Judges shall publish in the *Federal Register* a revised schedule of the rates for § 381.5(c)(3), the rate to be charged for compositions in the repertory of SESAC, which shall adjust the royalty amounts established in a dollar amount according to the greater of:

(1) The change in the cost of living determined as provided in paragraph (a) of this section; or

(2) One-and-a-half percent (1.5%).

(3) Such royalty rates shall be fixed at the nearest dollar.

* * * * *

Dated: December 12, 2017.

Suzanne M. Barnett,
Chief U.S. Copyright Royalty Judge.

Jesse M. Feder,
U.S. Copyright Royalty Judge.

David R. Strickler,
U.S. Copyright Royalty Judge.

Approved:

Carla D. Hayden,
Librarian of Congress.

[FR Doc. 2018-00735 Filed: 1/18/2018 8:45 am; Publication Date: 1/19/2018]